IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 6

B. CLINTON WATSON, ET UX
Appellants-Petitioners

vs.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD.
Appellee-Respondent

BRIEF ON BEHALF OF APPELLANTS-PETITIONERS

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THE CASE BELOW

This case is before the Court on appeal from and on certiorari to the United States Court of Appeals for the Fifth Circuit seeking a reversal of its judgment and decree in the case of Watson et ux v. Employers Liability Assurance Corp. Ltd., reported at 202 F. 2d 407, which decree affirmed that of the United States District Court for the Western District of Louisiana in the case under the same title reported at 107 F. Supp. 494.

Appellee, in Massachusetts, issued a policy of liability insurance to Gillette Company, and delivered that policy in Illinois. The policy contains a provision

prohibiting suit against the insurer by an injured person directly, which provision is valid in Massachusetts and in Illinois. The policy extended coverage in Louisiana which has statutes making such a provision invalid.

Appellee contends that Louisiana Revised Statutes of 1950, Title 22, Sections 655 and 983 (reproduced in full in appendix of this brief) run counter to the United States Constitution by (a) depriving appellee of its property without due process of law, (b) impairing the obligation of appellee's contract with its assured, the Gillette Company, (c) depriving appellee of the equal protection of the laws, or (d) denying to appellee its right to have full faith and credit given to the legislative acts and jurisprudence of the States of Massachusetts and Illinois, within the State of Louisiana.

JURISDICTION OF THE SUPREME COURT

This case has been appealed to this Court under the provisions of 28 U.S.C. 1254(2). It is also before the Court upon writs granted by this Court upon appellants' alternative application for ceriorari under the provisions of 28 U.S.C. 1254(1) and the holding of the Supreme Court in Bradford Electric Light Co. v. Clapper, 284 U.S. 221, 52 S. Ct. 118, 76 L. Ed. 254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, Section 1 (due process of law); U. S. Constitution, Art. IV, Section 1 (full faith and

credit); U. S. Constitution, Art. I, Section 10 (impairment of obligations of contracts) and Amendment XIV, Section 1 (equal protection of the laws).

QUESTION PRESENTED FOR REVIEW

Do the Louisiana statutes permitting a direct action against the insurer, within the terms and limits of the policy, by a person injured in Louisiana by the negligence or fault of the insured, run counter to the provisions of the Federal Constitution just cited, specifically when the policy is written and delivered in States other than Louisiana even though the policy applies and affords coverage in Louisiana?

STATEMENT OF THE CASE

This case is before the Court on both an appeal taken by appellants from a decree of the Court of Appeals for the Fifth Circuit and on writ of certiorari granted by this Court on May 3, 1954.

In accordance with Rule 16 (4) of this Court the question of jurisdiction will first be discussed. In order that this question may be fully presented, a short statement of the history and facts must first be set forth.

On April 5, 1952 appellants, husband and wife, instituted this tort action in a State Court of Louisiana. It was removed by defendant, Employers Liability Assurance Corporation, Ltd., hereinafter called Employers, to the District Court of the United States for the Western District of Louisiana, on diversity grounds.

Employers is a British corporation, engaged in the general insurance business and is and has been for many years authorized to transact an insurance business in the State of Louisiana.

The suit was instituted against Employers as the sole defendant under the provisions of Revised Statutes of 1950 of Louisiana. Title 22, Section 655, as amended by Acts 541 and 542 of the 1950 session of the Louisiana Legislature, which statutes are reproduced in full in the appendix of this brief.

After removal, Employers filed a motion to dismiss on the ground that the statutes of Louisiana, under which the action was brought, were violative of the Federal Constitution. (R. 11-14).

While unimportant here, appellants thereafter sought to join the Gillette Company as a party defendant but this joinder was disallowed by the District Court. Gillette, having been dismissed from the suit, is not involved in the case in this Court.

Employers contended that the statutes of Louisiana above cited are unconstitutional in that they (1) deprive defendant of its property without due process of law; (2) impair the obligation of its contract with its assured, Gillette; (3) deny to defendant the equal protection of the law and (4) deny to defendant its right to have the Courts of Louisiana and the Federal Courts sitting in Louisiana give full faith and credit to the legislative acts

and jurisprudence of the states of Massachusetts and Illinois. (R. 13).

One of the appellants, Mrs. Ruth S. Watson, suffered severe personal injuries as the result of the use of a patented hair waving product, known as a "Toni Home Permanent", a product manufactured by Gillette and sold and distributed throughout the United States, due to harmful ingredients therein. The other appellant, B. Clinton Watson, is the husband of Mrs. Ruth S. Watson, and joins his wife in the suit to recover the medical expenses incurred for the treatment of his wife and for the loss of her earnings while she was disabled as a result of the use of the named product, in conformity with Louisiana law, which vests in the husband the right to recover the expenses of medical treatment of the wife and for her loss of earnings.

Mrs. Watson purchased the wave set at a retail store in the Town of Arcadia, Louisiana, on November 9, 1951. On November 10, 1951 Mrs. Watson applied the product in accordance with the directions thereon and as a result of its use suffered the injuries for which the suit was brought.

In July, 1951, some four months prior to Mrs. Watson's injuries, Employers, in the State of Massachusetts, issued its policy of public liability insurance to Gillette, insuring it against all liability because of any product manufactured by it. (D. Ex.——, R. 11).

This policy was delivered to Gillette in the State of Illinois, where Gillette maintains its principal office. (R. 11).

Under the terms of the policy, Gillette is insured in all 48 states of the Union and Canada.

The policy contains a so-called "no action" clause, which reads as follows:

> "No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.
>
> "Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.
>
> "Terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes."

Admittedly, no suit had been previously brought against Gillette and the amount of Gillette's obligation had not been fixed either by judgment against it after

trial or by written agreement of Gillette, the Watsons and Employers.

Under the Louisiana statutes above cited, the injured party, so long as the accident occurred in Louisiana, has a direct right of action against the insurer, irrespective of the "no action" clause in a policy, and all insurance companies doing business in Louisiana are required by these statutes to consent in writing to be sued directly, irrespective of where the policy may have been issued or delivered, before the company will be given a certificate of authority to do business in Louisiana.

Brief History of Direct Action Statute

Acts 541 and 542 of 1950 amended and reenacted Act 195 of 1948 of the Louisiana statutes (reproduced in full in the appendix of this brief), which in turn amended and reenacted Act 55 of 1930 of the Louisiana statutes (reproduced in full in the appendix of this brief) which likewise in turn amended and reenacted Act 253 of 1918 of the statutes of Louisiana (reproduced in full in the appendix of this brief), the Act of 1918 merely provided that the insolvency of the insured would not release the insurer of its obligation to pay any judgment rendered against the insured covered by the policy. *Cf. Merchants Mutual Auto. Lia. Ins. Co. v. Smart, 267 U.S. 126, 69 L. Ed. 538, 45 S. Ct. 320.*

The Act of 1930 first introduced into the laws of Louisiana the privilege here sought by Mr. and Mrs. Watson to sue the insurance company direct, bypassing

the assured. As will be pointed out later in this brief, the Act of 1930 has been consistently construed by the Louisiana Courts to be procedural and not substantive and as authorizing direct actions against the insurer irrespective of where the policy might have been issued, whether within or without the confines of Louisiana, so long as the accident occurs in Louisiana and so long as the insurer is authorized to do business in Louisiana and service upon it can be obtained.

By the Act of 1948, it was provided that a direct action might be maintained when the policy was issued and delivered in Louisiana. Under that statute, while it was in force, the Court of Appeals for the Fifth Circuit held that the Legislature of Louisiana intended to change the law and that direct actions could not be maintained where the policy had been issued outside the state, so holding in *Belanger v. Great American Indemnity Company, 188 F. 2d 196.*

Evidently the Legislature of Louisiana meant to provide no such thing because at its very next session, it enacted Acts 541 and 542 of 1950.

Statute is remedial, not substantive.

Since the enactment of Act 55 of 1930, the State Courts of Louisiana have, without exception, held that a direct action might be maintained against the insurance company whether the policy was written in Louisiana or not. There is no State Court decision on this question as to Act 195 of 1948 but the State Courts of Louisiana have

consistently held that under the Acts of 1950 such an action is proper and that those statutes are remedial and procedural and in no way substantive. See *Churchman v. Ingram, 56 So. 2d 297*, a decision by the Louisiana Court of Appeal, Second Circuit, a Court in the Louisiana system roughly parallel to the United States Courts of Appeals in the Federal system. Following the decision of the Court of Appeal in the Churchman Case, the Supreme Court of Louisiana, the highest Court in the State, likewise so held in *Home Indemnity Company v. Highway Insurance Underwriters, 222 La. 540, 62 So. 2d 828.*

JURISDICTION ON APPEAL

The District Court held that the statutes were unconstitutional as depriving defendant of its property without due process of law. (R. 35-36). The Court of Appeals affirmed the decree of the district Court and approved the District Court's reasoning. (202 F. 2d 407).

This and another case, entitled "Bish v. Employers Liability Assurance Corporation" are companion cases. It so happened that the District Court, in deciding the question of constitutionality, set forth its reasons for so deciding in the Bish Case, reported at 102 F. Supp. 343, and rendered only a memorandum opinion in this case, reported at 107 F. Supp. 494. On the other hand, the Court of Appeals set forth its reasons for affirming the District Judge in this case and rendered only a memorandum opinion in the Bish Case. Hence, it will be necessary in discussing the reasoning of the District Court, which

was affirmed by the Court of Appeals in this case, to refer extensively to the District Court's opinion in the Bish Case.

The judgment of the District Court in this case, which was affirmed by the Court of Appeals, decrees that Acts 541 and 542 of the Louisiana Legislative Session of 1950 "be and the same are hereby declared to be unconsitutional, null and void." (R. 35-36). This judgment, as just stated, was affirmed by the Court of Appeals. Appellants believe that this Court is vested with jurisdiction on appeal under the provisions of 28 U.S.C. 1254 (2), which reads as follows:

> "By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. . . . . and the review on appeal shall be restricted to the Federal questions presented."

SUMMARY OF ARGUMENT

Jurisdiction on Appeal

The Supreme Court has jurisdiction of this case on appeal because, under U.S.C. Title 28, Sec. 1254(2), an appeal will lie to the Supreme Court from a Court of Appeals when that Court has declared a State statute to be unconstitutional as violative of the Federal Constitution. In the present case, the Court of Appeals, in approving the reasons for judgment of the District Court, held that the statutes of Louisiana under consideration were "unconstitutional, null and void."

Only Proper Party is before the Court.

There were two defendants below. The suit was first instituted against appellee in a State Court and removed by it on diversity grounds. After removal, complainants sought to make Gillette a party defendant by an amended complaint. That complaint was disallowed and Gillette was dismissed from the suit. The dismissal of the amended complaint by the District Court was approved on appeal. Gillette is engaged in the manufacturing business and Employers is engaged in the insurance business. The statutes involved in this appeal apply solely to the insurance business. They affect and apply to Employers alone and not to Gillette. It was on Employers' motion to dismiss, as applicable to it alone, that the District Court held the statutes to be unconstitutional. Therefore, Gillette is not only not a necessary party appellee, but is an improper party appellee, since it will not be and cannot be affected by whatever the final holding of the Court may be. A party who is not interested, as is true of Gilletee, in either maintaining or reversing the decree appealed from is not a necessary party to the suit.

The Obligation of the Contract is not Impaired.

The contract between appellee and Gillette was entered into **after** the passage of the statutes involved. A law can not impair the obligation of a contract confected after the law went into effect.

Equal Protection of the Laws is Afforded.

Every insurance corporation, domestic or foreign, is placed on the same footing and treated exactly alike. There is no ground for the assertion that unequal treatment is meted out to foreign corporations.

No Property is taken without Due Process of Law.

Appellee wrote its policy to extend coverage in Louisiana. It is permitted to offer and interpose every defense to any law suit which Gillette could offer. No property is taken without a full-dress trial where every defense on the merits of the suit may be made. The statutes involved merely bypass the insured and permit suits directly against the insurer, always the real defendant, a perfectly proper exercise of the police power of the State.

The Attacked Statutes are Procedural and not Substantive.

The Appellate Courts of Louisiana (the Supreme Court of Louisiana, the Court of last resort in Louisiana, and the three intermediate courts, the Courts of Appeal) have consistently held, from the time a "direct action" was first permitted by Louisiana law in 1930, to date, that the statutes in question are purely procedural and remedial and contain nothing substantive. The United States Court of Appeals in the instant case has held directly to the contrary, ruling that the statutes are substantive,

thus not following the holding of this Court in *Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 85 L. Ed. 1477, 61 S. Ct. 120,* and thus making an independent determination for itself instead of accepting Louisiana's rule of conflict of laws.

Full Faith and Credit Provision of the Federal Constitution is not Involved.

The question involved is whether the law of Louisiana or of another state should be applied to a tort action arising in Louisiana, not whether Louisiana will give full faith and credit to the laws of a sister state. There is no question of full faith and credit at all; the question is solely whether the law of the forum or of another jurisdiction should be applied to local causes of action and local modes of procedure.

ARGUMENT

I

Mr. and Mrs. Watson are properly before the Court on Appeal.

As the quoted Act of Congress (28 U.S.C. 1254(2)) says primarily, an appeal lies to this Court from the Court of Appeals when the Court of Appeals has held a State statute to be unconstitutional. That the Court of Appeals held the Louisiana statutes in question to be unconstitutional, there can be no doubt.

Gillette would be an Improper Party

One of the grounds upon which Employers contends that this Court does not have appellate jurisdiction is that all necessary parties are not before the Court because of the fact that when appellants appealed to this Court from the decision of the Court of Appeals, they did not make Gillette a party-appellee.

Gillette is not only **not** a necessary party-appellee but would be an improper party-appellee. Gillette was sought to be brought into the suit solely on the ground that it was actually doing business in Louisiana and had thus made itself amendable to suit in the Louisiana courts. The amended petition seeking to join Gillette as a defendant in the suit was disallowed and it was dismissed from the case. The District Court then went on to hold that the statutes under which Employers was sued **were unconstitutional and it was only from this judgment or this holding that the appeal was taken.**

A most casual reading of the statutes involved clearly reveals that Gillette is in no way a necessary party herein and is in no way affected. Whether the statutes be constitutional or not can in no way affect Gillette. Under the provisions of 28 U.S.C. 1254 (2) the review on appeal shall be restricted to the Federal questions presented. No Federal question has ever been presented affecting Gillette and Gillette, not being in the insurance business, could in no way be either harmed or aided by the validity or the invalidity of the statutes involved. Only

the question of the constitutionality of these statutes is before the Court and only Mr. and Mrs. Watson on the one hand and Employers on the other hand can in any wise be affected thereby.

It has been held by this Court that a party to an action who has no legal interest in maintaining or reversing the decree appealed from is not a necessary party to the appeal. *Basket v. Hassel, 107 U.S. 602, 606, 27 L. Ed. 500, 2 S. Ct. 415; Amadeo v. Northern Assurance Company, 201 U.S. 194-202, 50 L. Ed. 722, 26 S. Ct. 507; Winters v. United States, 207 U.S. 564-578, 52 L. Ed. 340, 28 S. Ct. 207.*

State Statutes were held void below.

It having been held in so many words by the District Court that the statutes involved are unconstitutional, null and void as running counter to the Constitution of the United States, and that ruling having been wholeheartedly affirmed by the Court of Appeals, it seems quite clear that this appeal comes within the provisions of 28 U.S.C. 1254(2). It is urged by Employers that the Court below did not hold these statutes to be unconstitutional entirely, but held them to be unconstitutional only if found to apply to appellee and that the holdings below were that if the statutes applied to appellee they were unconstitutional, null and void. This is a laborious exposition of a circular argument.

Since the Courts below necessarily held that the statutes did apply to appellee, for otherwise the plaintiffs

below could not have brought the suit against appellee at all, those Courts necessarily held that the statutes were unconstitutional in so far as appellee is concerned.

It is impossible to follow appellee's argument that the Court of Appeals did not hold the statutes unconstitutional but merely held that they did not apply to appellee, in view of the provisions of Section 655 of Title 22, which reads as follows:

> "This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana."

Bluntly, the decisions of the Courts below wiped this provision off the books. They could only have done so by holding that the statute was unconstitutional.

We submit that it makes no difference as to the jurisdiction of this Court which way it was held below because the right of appeal accrues as well when there is a question as to the unconsitutional **application** of a State statute as when the statute as a whole has been declared invalid. *Dahnke-Walker Co. v. Bondurant, 357 U.S. 282, 66 L. Ed. 239, 42 S. Ct. 106; Furst v. Brewster, 282 U.S. 493, 75 L. Ed. 478, 51 S. Ct. 295.*

We submit that the appeal was properly taken to this Court and that jurisdiction is vested in this Court.

II

ON THE MERITS

This Court having granted certiorari (R. 52), whether the case is properly before the Court on appeal or not, surely it is before the Court under the writ of certiorari granted to the Watsons.

THE OBLIGATION OF THE CONTRACT IS NOT IMPAIRED

We shall first take up appellee's contention that the statutes impair the obligation of its contract with its assured.

The statutes attacked became the law of Louisiana on July 31, 1950. The contract was made in 1951. When appellee entered into the contract with Gillette the statutes had been in effect as the law of Louisiana for about a year. At the time appellee made the contract with Gillette, it specifically contracted with regard to the Louisiana laws when it provided in its policy that it would be operative and would protect and insure Gillette throughout the entire United States, of which assuredly Louisiana is a part.

This Court has held time and time again that the obligation of a contract cannot be impaired by the passage of legislation which becomes law before the confection of the contract. *Ogden v. Sanders, 25 U. S. 213, 12 Wheat 213, 6 L. Ed. 606; New York Life Ins. Co. v. Cravens, 178 U. S. 389, 44 L. Ed. 1116, 20 S. Ct. 962; Munday v. Wis-*

consin Trust Co., 252 U. S. 499-503, 64 L. Ed. 684-689, 40 S. Ct. 365; Home Building and Loan Association v. Blaisdell, 290 U. S. 398, 78 L. Ed. 413, 54 S. Ct. 231, 88 A. L. R. 1481.

EQUAL PROTECTION OF THE LAWS IS AFFORDED

Nor can it be said that these statutes in any way deprive the appellee of the equal protection of the laws. Appellee is in no different position than is every other insurance company doing business in Louisiana, whether that company be a Louisiana corporation or a foreign corporation authorized to do business in the State. All are treated equally and no unequal treatment is given any of them. They are all afforded the equal protection of the laws.

NO PROPERTY IS TAKEN WITHOUT DUE PROCESS OF LAW

Reverting to the holdings of the District Court in the Bish case, supra, and in *Mayo v. Zurich Gen. A. & L. Ins. Co., 106 F. Supp. 579* it will be noted that both were decided by the same District Judge.

In the Mayo Case, the District Judge, in so many words, held that the effect of these statutes is to deprive the insurer of its property without due process of law. Again in the Bish Case, the District Judge was of the same opinion still. It appears that the rulings of the District Court were primarily influenced by its conclusion that these statutes are unwise legislation and sometimes might place an insurance company in a difficult position and under a great handicap, all of which is exemplified by the illustration contained in the opinion of the District Court in the Bish Case.

Whether this type of legislation is wise or unwise is not within the province of the Court to decide. That is something that addresses itself to the legislative branch of the government. Wise or unwise the legislation stands unless it runs counter to some provision of the constitution, and the fact that a Judge might think this legislation to be bad law from the viewpoint of the public welfare has nothing to do with its constitutionality.

It is difficult indeed to pinpoint in what manner an insurance company is deprived of its property without due process of law when the statutes specifically provide that any suit brought thereunder is limited to the "terms and limits of the policy" and when the statutes further provide that any action brought under them shall be subject to all of the lawful conditions of the policy and the defenses which could be urged by the insurer to a direct action brought by the insured. This means that whatever defenses to the action are open to the assured are open to the insurer. If the insured was not negligent, that defense is open to the insurer. If the claimant was contributorily negligent, that defense is open to the insurer. Every defense that the assured himself could assert against the claim of a plaintiff is open to the insurance company. *Sheeren v. Gulf Ins. Co., 174 So. 380 (La. App.).* No property is taken from it unless it be by verdict and judgment on the facts after a full, searching trial where both sides introduce their evidence and assert their legal contentions, which are resolved by the Court or jury as the case may be.

These statutes simply eliminate the method of requiring any injured plaintiff to first sue the tort feasor himself and after obtaining judgment against him and, being unable to collect it, then to institute a second suit on the judgment against the insurer. All of this roundabout procedure is cut away and an injured party is permitted to go directly to the heart of the matter and recover a judgment against the real defendant and the real party which will pay such judgment. Since the policies of insurance provide that the insurance company will defend the law suit it will be seen that no due process is denied the insurer and no property is taken without due process of law.

Act 541 of 1950 is that statute which confers the right of direct action. It is by no means unique. Other states have somewhat similar laws, including Alabama, Arkansas, California, Georgia, Idaho, Iowa, Kansas, Massachusetts, New Jersey, New York, Ohio, Rhode Island, Texas, Washington and Wisconsin.* It is, of course, true

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(*) Alabama Code, 1940, Title 28, Paragraph 11, 12; Arkansas Acts 1927, Page 667, Paragraph 1 and 2; California Insurance Code, Paragraph 11, 580 (St. 1935, p. 716); Georgia Code, 1933, Paragraph 23-1502, 32-919, 68-501, et seq.; Idaho Code 1932, Paragraph 28-102; Iowa Code 1939, Paragraph 5100.26; Kansas Rev. St. Supp. 1933, 66-1128, Hudson v. Kitchum, 155 Kan. 332, 133 Pac. 2d 171; Massachusetts G.L. (Ter. Ed) c. 175, Paragraph 113, c. 214, Paragraph 3, Cl. 10; New Jersey, N.J.S.A. 39:6-1, et seq; New York Insurance Law, Paragraph 167; Ohio Gen. Code, Paragraph 9510-4; Rhode Island General Laws 1923, c. 258, Paragraph 7; Texas Vernon's Ann. Civ. St., Article 911 A; Washington Rev. Comp. Stat. Paragraph 6391; Wisconsin Stat. 1943, Paragraph 85.93.

that the mentioned statutes of the other states are not precisely like that of Louisiana, with the possible exception of Wisconsin's, but under all of them a direct action against the insurer is afforded in appropriate cases.

Written Consent Unimportant

The second of the two statutes challenged, Act 542 of 1950, (La. Rev. Statutes 22:983) provides that no insurance company shall be issued a certificate of authority to do business in Louisiana until as a condition precedent it shall consent to be sued by a person who may be injured in Louisiana, directly upon its policy whether or not such policy contains provisions forbidding such direct action and whether or not the policy was written or delivered in the State of Louisiana.

It is contended by appellee that this statute deprives it of property without due process of law because it forces it to consent in advance to be sued as the price of transacting its business in Louisiana. In support of this contention it urges that if it does not so consent it will be deprived of its right to do business in Louisiana and its right to the premiums on the policies it would and could write in the State of Louisiana.

In the first place it is submitted that whether the particular statute is constitutional or not is of no particular importance because under Act No. 541 the insurance company may be sued directly on an out of state policy so long as it does business in Louisiana and Mr. and Mrs. Watson are not dependent upon Act 542 for the maintenance of their suit.

By Act 541 of 1950 the Legislature provided that an insurance company could be sued directly, no matter where the policy was issued and delivered, if the accident occurred in Louisiana. By Act 542 of 1950 the Legislature instructed the Secretary of State not to admit a foreign insurance company to the state until it had agreed to abide by the mentioned provision in Act 541. Obviously, if Act 541 is constitutional, i.e., if the Legislature had the power to say: "this right of action shall exist whether the policy of insurance sued upon was written and delivered in the State of Louisiana or not" then it had the additional power to require foreign insurance companies to agree to put themselves on the same basis as Louisiana companies. Conversely, it is also obvious that if the Legislature lacked the power to enact the quoted words, then it lacked the power to force a foreign insurance company to sign the consent agreement.

Since Act 542 will either stand or fall with Act 541 it would serve no useful purpose to dicuss it further.

State May Impose Conditions for Admission

Reiterating our belief that Employers has the right to test the constitutionality of these statutes, we point out that it has been the law for many years that there is no constitutional right given to a corporation to transact business in a state other than the state of its creation and that other states may impose upon the foreign corporation such regulations and conditions as it sees fit before permitting the corporation to do business within its boundaries

so long as no constitutional right is denied it. 23 Am. Jur., Page 214, Sec. 245, 246 and the host of cases there cited.

Furthermore, it has long been the law that a state may exclude foreign corporations even on conditions which would impair their contracts in so far as those contracts contemplated performance within the admitting state. 23 Am Jur., Sec. 248, Page 217. Here the contract between appellee and its insured contemplated performance in Louisiana with respect to all claims arising against Gillette in Louisiana. This proposition of law is so well settled that it would seem to be idle to labor the question further. These statutes are far less far-reaching than were those of the states of New York, California and Washington which were sustained by this Court in the cases of *Hoopeston Canning Co. v. Cullen, 318 U. S. 313, 87 L. Ed. 777, 63 S. Ct. 602; California State Automobile Association Inter-Insurance Bureau v. Maloney, 341 U.S. 105-111, 95 L. Ed. 788, 71 S. Ct. 601; State of Washington v. S. Ct. of Washington, 289 U.S. 361, 77 L. Ed. 1256, 53 S. Ct. 624;* and *International Shoe Co. v. Washington, 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 1541.*

The right of a state to regulate insurance companies doing business within its boundaries has been sustained many times by this Court which has held that the state has broad regulatory powers over the insurance business. See: *Osborn v. Ozlin, 310 US 53, 84 L. ed 1074, 60 S. Ct. 758; German Alliance Ins. Co. v. Lewis, 233 US 389, 58 L ed 1011, 34 S Ct 612, LRA 1915C 1189; Aetna Ins. Co. v. Hyde, 275 US 440, 72 L ed 357, 48 S Ct 174; O'Gorman & Young v. Hartford Fire Ins. Co. 282 US*

251, 75 L ed 324, 51 S Ct 130, 72 ALR 1163; National Union Fire Ins. Co. v. Wanberg, 260 US 71, 67 L ed 136, 43 S Ct 32; La Tourette v. McMaster, 248 US 465, 63 L ed 362, 39 S Ct 160; Hardware Dealers' Mut. F. Ins. Co. v. Glidden Co. 284 US 151, 76 L ed 214, 52 S Ct 69; Neblett v. Carpenter, 305 US 297, 83 L ed 182, 59 S Ct 170; Orient Ins. Co. v. Daggs, 172 US 557, 43 L ed 552, 19 S Ct 281; Whitfield v. Aetna Life Ins. Co., 205 US 489, 51 L ed 895, 27 S Ct 578; Hoopeston Canning Co. v. Cullen, 318 US 313, 87 L ed 777, 63 S Ct 602, 145 ALR 1113.

As this Court said in *California Automobile Association v. Maloney, 341 U. S. 105-111, 95 L ed 788, 71 S Ct. 601*, the police power of the state covers all public needs. There the Court said:

> "What was there said about the police power— that it 'extends to all the great public needs' and may be utilized in aid of what the legislative judgment deems necessary to the public welfare (p. 111)— is peculiarly apt when the business of insurance is involved—a business to which the government has long had a 'special relation'. See Osborn v. Ozlin 310 US 53, 65, 66, 84 L ed 1074, 1079, 1080, 60 S Ct 758. Here, as in the banking field, the power of the state is broad enough to take over the whole business, leaving no part for private enterprise. Mountain Timber Co. v. Washington, 243 US 219, 61 L ed 685, 37 S. Ct. 260, Ann Cas 1917D 642, 13 NCCA 927; Osborn v. Ozlin, supra (310 US p 66, 84 L ed 1079, 60 S Ct 758)."

THE STATUTES ATTACKED ARE PROCEDURAL AND CONTAIN NOTHING SUBSTANTIVE

If the Louisiana Courts are correct in their holdings that these statutes are procedural and not substantive, then the whole question of constitutional infringement goes by the boards.

Beginning with *Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co., 138 So. 18*[8] to and including *Home Insurance Co. v. Highway Insurance Underwriters, 222 La. 540, 62 So. 2d 828*, the Louisiana Courts, including the three Courts of Appeal and the Supreme Court, have held without exception that Act 55 of 1930 and its progeny are procedural and contain nothing substantive.

See *Robbins v. Short, (La. App.) 165 So. 512, 514; Ruiz v. Clancy, 182 La. 935, 162 So. 734; Stephenson v. List Laundry & Dry Cleaners, 182 La. 383, 162 So. 19; Parker v. Home Indemnity Co. of N.Y. (La. App.) 41 So. 2d 783; Rossville Commercial Alcohol Co. v. Dennis Sheen Transfer Co., (La. App.) 18 La. App. 725, 138 So. 183; Gager v. Teche Transfer Co., (La. App.) 143 So. 62; Graham v. American Employers Insurance Co., (La. App.) 171 So. 471; Bougon v. Volunteers of America, et al, (La. App.) 151 So. 797; Reeves v. Globe Indemnity Company, 182 La. 905, 162 So. 724; Tuck v. Harmon, (La. App.) 151 So. 803;* and *Burke v. Mass. Bonding & Insurance Co., 209 La. 495, 24 So. 2d 875.*

It is apparent that the holding of the Court of Appeals in this case is in direct conflict with the holdings of the Louisiana Courts. The Court of Appeals has also

held contrary to the settled rule that a Federal Court, in deciding diversity cases, must use the state's conflicts of laws rule in passing upon the question. This Court, in *Klaxon Co. v. Stentor Electric Mfg. Co., Inc., 313 US 487, 85 L ed 1477, 61 S Ct 1020*, said:

> "The principal question in this case is whether in diversity cases the federal courts must follow conflict of law rules prevailing in the states in which they sit. We left this open in Ruhlin v. New York L. Ins. Co., 304 US 202, 208, note 2, 82 L ed 1290, 1293, 58 S. Ct 860. The frequent recurrence of the problem, as well as the conflict of approach to the problem between the Third Circuit's opinion here and that of the First Circuit in Sampson v. Channel, 110 F (2d) 754, 759-762, 128 ALR 394, led us to grant certiorari." (P. 1479)

Further in the same case, the Court had this to say:

> "We are of the opinion that the prohibition declared in Erie R. Co. v. Tompkins, 304 US 64, 82 L. ed 1188, 58 S Ct 817, 114 ALR 1487, against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the Federal Court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. See Erie R. Co. v. Tompkins, supra, at 74-77. Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. Whatever lack of uniformity this may

produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws. Subject only to review by this court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. Cf. Milwaukee County v. M. E. White Co., 296 US 268, 272, 80 L ed 220, 225, 56 S Ct 229. This Court's views are not the decisive factor in determining the applicable conflicts rule. Cf. Funkhouser v. J. B. Preston Co. 290 US 163, 78 L ed 243, 54 S Ct 134. And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be." (P. 1480)

Statute is valid exercise of police power.

In the final analysis the question boils down to whether it lies within the power of the state in the exercise of its police power to constitutionally enact legislation of the kind here involved. Most assuredly the state has an overwhelming interest in protecting the rights of persons within its boundaries and affording to them a simple, practical method of obtaining compensation at the place of injury. The present case is an excellent example of the wisdom of leaving to the states their rights through their law-making bodies to confer upon an injured person the privilege of obtaining redress where he was injured. Admittedly, Gillette's manufactured products were shipped into Louisiana and sold to the public in that state.

Admittedly, if a member of the general public is injured in Louisiana through the use of a product manufactured by Gillette and sold in Louisiana, that person has a cause of action for the injuries sustained. It is difficult to conceive of a more reasonable or a more valid exercise of the police powers of the state. These statutes do no more than to require the ultimate judgment debtor to answer for the tort at the place the tort was committed, where the witnesses are available and in the Courts of either the state in which the tort was committeed or the proper Federal Court sitting therein. There has been cited by appellee no good reason for striking down this legislation, no case of this or any other Court has been cited holding that these statutes are anything but procedural and no case holding that there is an impairment of the obligation of a contract or the denial of due process of law.

When it is realized that the statutes under attack merely place the foreign insurance company on the same basis with insurance companies organized in Louisiana the fallacy of appellee's argument is apparent.

The closest appellee has come to any decisions remotely touching on this question are four cases of this Court, namely, *New York Life Insurance Company v. Head, 234 U. S. 149, 58 L. Ed. 1259, 34 S. Ct. 879; Aetna Life Insurance Co. v. Dunken, 266 U.S. 389, 69 L. Ed. 342, 45 S. Ct. 129; Home Insurance Company v. Dick, 281 U.S. 397, 74 L. Ed. 926, 50 S. Ct. 338;* and *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, 78 L. Ed. 1178, 54 S. Ct. 634.* All of these cases hold that

a state may not validly legislate upon contracts confected and existing outside its boundaries and **not operative** within its boundaries. If appellee's policy here afforded no coverage within the State of Louisiana and did not insure Gillette for its torts committed in Louisiana, these cases would certainly be pertinent. But the dividing line is that in this case the contract was expressly made operative in Louisiana, did apply in Louisiana and covered the liability of Gillette incurred in Louisiana. Therein lies the difference and removes the cited cases from any application to the case at bar.

FULL FAITH AND CREDIT IS NOT INVOLVED

Although Employers assigned as one of the reasons why the statutes under consideration are unconstitutional its contention that they deny to it its right to have full faith and credit given to the legislative acts and jurisprudence of the States of Massachusetts and Illinois within the State of Louisiana, in reality, this principle has no place in this case and this contention has never been seriously urged by Employers in the Courts below. It was never mentioned in any of its briefs.

Nevertheless, no full faith is denied. The question is not whether the law of Massachusetts or Illinois must be recognized and applied in the present case but whether the Louisiana law is valid and should be applied. It is well settled that a state is not compelled to enforce the terms of an insurance policy normally subject to the law of another state where the enforcement will conflict with

the public policy of the state of the forum. *Hoopeston Canning Co. v. Cullen, 318 U. S. 313, 87 L. Ed. 777, 63 S. Ct. 602; Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481, 61 S. Ct. 1023; Alaska Packers Asso. v. Industrial Acci. Comm., 294 U. S. 532, 79 L. Ed. 1044, 55 S. Ct. 518.*

CONCLUSION

We respectfully submit that there is no constitutional infringement in the statutes in question and that the Courts below erred in so concluding.

We submit that the decrees of the Courts below should be reversed, the statutes held to be constitutional as in no way conflicting with any provisions of the Constitution of the United States, and held to be a valid exercise of the police powers of the state and that the case should be remanded to the District Court for further proceeding.

Respectfully submitted,

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APPENDIX

ACT 253 OF 1918 OF STATUTES OF STATE OF LOUISIANA

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That, after the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and, in case of such insolvency or bankruptcy, an action may be maintained within the terms and limits of the policy by the injured person or his or her heirs, against the insurer company.

Section 2. Be it further enacted, etc., That the issuance of any policy against liability which does not contain the clause above specified shall be a misdemeanor, punishable by a fine of not less than fifty dollars ($50.00) and not more than five hundred dollers ($500.00) or imprisonment of not less than one month and not more than twelve months, or both at the discretion of the Judge.

Section 3. Be it further enacted, etc., That this Act shall take effect and be in force from and after October 1, 1918.

Section 4. Be if further enacted, etc., That all laws or parts of laws in conflict herewith be and the same are hereby repealed."

ACT 55 OF 1930 OF STATUTES OF LOUISIANA

Section 1. Be it enacted by the Legislature of Louisiana, That the title of Act 253 of 1918 be amended and re-enacted so as to read as follows:

An Act providing that no policy against liability shall be issued unless it contains a proviso that the insolvency or bankruptcy of the assured shall not release the company from liability for injury sustained or loss occasioned during the life of the policy; prescribing what shall constitute prima facie evidence of insolvency; providing for direct action within the terms and limits of the policy by the injured person, his or her heirs, and the place where such action may be brought; and providing a penalty for the violation of this act.

Section 2. That Section 1 of Act 253 of 1918 be amended and reenacted so as to read as follows:

Section 1. That, after the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and any judgment which may be rendered against the assured, for which the insurer is liable, which shall have become executory, shall be deemed prima facie evidence of the insolvency of the assured, and an action may thereafter be maintained within the terms and limits of

the policy by the injured person or his or her heirs against the insurer company. Provided further that the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer company within the terms, and limits of the policy, in the parish where the accident or injury occurred, or in the parish where the assured has his domicile, and said action may be brought either against the insurer company alone or against both the assured and the insurer company, jointly or in solido.

Provided that nothing contained in this act shall be construed to affect the provisions of the policy contract if the same are not in violation of the laws of this State.

It being the intent of this act that any action brought hereunder shall be subject to all of the lawful conditions of the policy contract and the defenses which could be urged by the insurer to a direct action brought by the insured; provided the term and condition of such policy contract are not in violation of the laws of this State."

SECTION 14.45 OF ACT 195 OF 1948 OF STATE OF LOUISIANA (THE LOUISIANA INSURANCE CODE)

"No policy or contract of liability insurance shall be issued or delivered in this State, unless it contains provsions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned

during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. Nothing contained in this section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State."

TITLE 22: SECTION 655, LOUISIANA REVISED STATUTES OF 1950, AS AMENDED BY ACT 541 OF 1950.

"No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of

the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly or in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred with the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the

insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state."

TITLE 22: SECTION 983, LOUISIANA REVISED STATUTES OF 1950, AS AMENDED BY ACT 542 OF 1950.

A. After the requirements of R.S. 22:982 have been completed and before a certificate of authority is issued by the Secretary of State, a foreign or alien insurer shall satisfy the Secretary of State that:

(1) Its name is not the same as, or deceptively similar to the name of any other insurer already authorized to transact business in this state;

(2) It is possessed of at least the minimum capital and surplus requirements for similar domestic insurers authorized to transact like kinds of insurance which is authorized to transact in the state of its domicile or entry, including, if a mutual or reciprocal insurer, writing non-assessable policies, the surplus requirement for a similar domestic mutual insurer to issue non-assessable policies;

(3) Its funds are invested in accordance with the laws of its domicile.

B. Before issuance of the certificate of authority to a foreign insurer, such insurer shall make a deposit as required by Part XXII and file a certificate from an of-

ficial of another state showing that a deposit has there been made, in the same amount that is required of a similar domestic insurer transacting like kinds of insurance.

C. Before issuance of the certificate of authority to an alien insurer, such insurer shall make a deposit as required by Part XXII and must maintain within the United States assets in amount no less than its outstanding liabilities arising out of its insurance transactions in the United States, and which assets shall be in addition to the larger of the following sums:

(1) The largest amount of deposit required by this Code to be made in this state by any type of domestic insurer transacting like kinds of insurance; or

(2) Two hundred thousand dollars.

The trust deposit shall be for the security of all policyholders or policyholders and obligees of the insurer in the United States. It shall not be subject to diminution below the amount currently determined in accordance with this Sub-section so long as the insurer has outstanding any liabilities arising out of its business transacted in the United States.

The trust deposit shall be maintained with public depositories or trust institutions within the United States approved by the Secretary of State.

D. Before issuing a certificate of authority to a foreign or alien insurer, the Secretary of State may cause an examination to be made of its condition and affairs.

E. No certificate of authority to do business in Louisiana shall be issued to a foreign or alien liability insurer until such insurer shall consent to being sued by the injured person or his or her heirs in a direct action as provided in Section 655 of this Title, whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided that the accident or injury occurred within the State of Louisiana. The said foreign or alien insurer shall deliver to the Secretary of State as a condition precedent to the issuance of such authority, an instrument evidencing such consent."